93-286

Supreme Court, U.S.
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NO.

Supreme Court of the United States

October Term, 1993

HARLAN D. DOUGLASS AND MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,

Petitioners,

-against-

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Joseph P. Delay
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Attorneys for Petitioner
Douglass and Hassing

QUESTION PRESENTED

Were Petitioners, ("DOUGLASS"), denied their State and Federal Constitutional rights of due process by relying on the clear, unambiguous language of the Notice of Default and Notice of Trustee's Sale served on DOUGLASS under a nonjudicial foreclosure sale?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Idaho Supreme Court are Appellants, DOUGLASS (also appellants in Supreme Court of Idaho No. 18748) and the Respondent, Frontier Federal Savings and Loan Association ("FRONTIER").

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NO.

IN THE

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HARLAN D. DOUGLASS AND MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,

Petitioners,

-against-

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners herein respectfully request that a writ of certiorari issue to review the Idaho State Supreme Court's judgment and opinion entered on April 23, 1993 and its order denying petition for rehearing entered on June 18, 1993.

OPINIONS BELOW

The decision of the Supreme Court of the State of Idaho is reported at 93.9 ISCR 455 (1993). The Idaho Supreme Court, in a split decision, affirmed the summary judgment in favor of FRONTIER on April 23, 1993 (Appendix A). The Idaho Supreme Court, on June 18, 1993, denied DOUGLASS' petition for rehearing (Appendix B).

BASIS FOR JURISDICTION

This Court has jurisdiction to review the Idaho Supreme Court's final decision and judgment pursuant to Rule 10.1(c) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Amendment XIV, § 1 of the United States Constitution provides, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . .."

Article I, Section 13 of the Idaho State Constitution provides, "[n]o person shall . . . be deprived of life, liberty or property without due process of law."

Idaho Code § 45-1505 provides:

The trustee may foreclose a trust deed by advertisement and sale under this act if:

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provisions; and

(3) The trustee or beneficiary shall have filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the

book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election **to sell or cause to be sold such property to satisfy such obligation**; and a copy of such notice by registered or certified mail to any person requesting such notice of record as hereinafter provided.

(4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed.

(Emphasis added)

Idaho Code §45-1512 allows a beneficiary under a deed of trust to seek a deficiency judgment after a trustee's sale under a deed of trust. This section provides:

At any time within three months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at such date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

STATEMENT OF THE CASE

DOUGLASS defaulted on a Note and Deed of Trust held by FRONTIER on property located in Idaho. FRONTIER served DOUGLASS with a nonjudicial Notice of Trustee's Sale (Appendix C) and Notice of Default (Appendix D), stating that the real property would be sold and the sale would "satisfy" the obligation. DOUGLASS relied on the language of the Notice of Trustee's Sale and consequently did not bid on the property to protect his interests against a deficiency judgment (H. Douglass Aff., Appendix E).

Following the nonjudicial sale, FRONTIER filed a complaint seeking a deficiency judgment in the District Court of Idaho against DOUGLASS for $500,680.24 plus interest. Both FRONTIER and DOUGLASS moved for summary judgment. The District Court granted

FRONTIER's summary judgment against DOUGLASS permitting recovery of a deficiency judgment following the nonjudicial sale in the sum of $500,680.24 plus interest and attorney's fees. DOUGLASS appealed the summary judgment to the Idaho Supreme Court. DOUGLASS argued that FRONTIER waived its right to any deficiency judgment by using the language, "to be sold to satisfy said obligation" in its notice. DOUGLASS asserted that FRONTIER's language implicitly notified DOUGLASS that there would be no claim for a deficiency judgment. The Idaho Supreme Court rejected DOUGLASS' argument and affirmed the District Court's summary judgment against DOUGLASS. The Idaho Supreme Court held that FRONTIER gave adequate notice and was not precluded from asserting a deficiency judgment against DOUGLASS.

The majority held that DOUGLASS would have had to look beyond the notice itself in order to be notified of a possible deficiency judgment. The majority, however, held FRONTIER had served DOUGLASS with adequate notice of the deficiency judgment. The majority reasoned that if DOUGLASS would have "construed together" I.C. § 45-1505 and I.C. § 45-1512, DOUGLASS would have had adequate notice of a deficiency judgment. But, FRONTIER failed to provide or even make reference to either statute in its Notice of Default or Notice of Trustee's Sale.

DOUGLASS filed a Petition for Rehearing to the Idaho Supreme Court asserting that FRONTIER did not give DOUGLASS sufficient notice of the deficiency judgment. The Idaho Supreme Court denied DOUGLASS's petition.

The focal point of this appeal is DOUGLASS' right to due process notice. The Idaho Supreme Court's decision penalized DOUGLASS for relying on the clear language of the Notice of Default and Notice of Trustee's Sale. FRONTIER's inadequate notice of a deficiency judgment cannot be cured by requiring DOUGLASS to refer to Idaho statutory law which was never referenced in the Notice of Default or Notice of Trustee's Sale. The contents of FRONTIER's notice supersedes the statutes. The literal language of FRONTIER's notice advised DOUGLASS that FRONTIER would not be entitled to a deficiency judgment. The Idaho Supreme Court's decision denies DOUGLASS his right to due process. The language of the notice was clear and unambiguous; the property was to be sold and such sale would "satisfy" the obligation.

Satisfaction of an obligation by definition is inconsistent with a deficiency.

The Idaho Supreme Court's decision upholding FRONTIER's inadequate notice violates DOUGLASS' right to procedural due process. DOUGLASS now petitions this Court to uphold DOUGLASS' State and Federal Constitutional right of procedural due process.

REASONS FOR GRANTING THE WRIT

I. THE IDAHO SUPREME COURT DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT BY DENYING DOUGLASS DUE PROCESS.

A. Inadequate Notice

The Idaho Supreme Court held that FRONTIER's Notice of Trustee's Sale under the nonjudicial proceedings gave DOUGLASS effective notice of a

deficiency judgment. The Idaho Supreme Court's decision violates DOUGLASS' right to due process and conflicts with precedent decided by this Court.

This Court has determined that due process requires a person who is in jeopardy of loss be given notice of the case against him in order to have the opportunity to protect his interests. Mathews v. Eldridge, 424 U.S. 319 (1976). In Mathews, this Court held that due process is necessary to insure a person whose property or rights are about to be taken or lost should be given a meaningful opportunity to present their case. Mathews, at 349.

The Idaho and United States Constitutions guarantee the right to due process by requiring a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. Rudd v. Rudd,

666 P.2d 639 (Idaho 1983). The fact that the Idaho Constitution contains a due process clause with the same language found in the Fourteenth Amendment to the Constitution of the United States indicates that the drafters of the Idaho Constitution believed the federal due process clause did not make it unnecessary for the Idaho Constitution to guarantee due process of law. Cootz v. State, 785 P.2d 163 (Idaho 1989).

Under Idaho law, the right to use one's property in a lawful manner is within the protection of section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law. O'Connor v. City of Moscow, 202 P.2d 401 (Idaho 1949). Additionally, the Idaho courts

have explained that the fundamental requirement of due process is the opportunity to be heard in a meaningful manner. Sweitzer v. Dean, 798 P.2d 27 (Idaho 1990).

The Notice of Trustee's Sale contained the plain and simple language that the property was to be sold by foreclosure to "satisfy" the obligation. The Notice of Trustee's Sale to DOUGLASS is similar to notice required by a summons and complaint. A person so served has the right to rely solely on the clear meaning of the summons and complaint language, otherwise he is denied due process.

The Idaho Supreme Court's decision defeats the purpose and intent of proper notice within the parameters established by this Court for due process. Because the Notice of Default and Notice of Trustee's Sale failed to apprise

DOUGLASS of the impending deficiency judgment, DOUGLASS' right to due process was denied and his Constitutional rights were violated.

This Court has held that "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 14 (1978). In Craft, this Court reasoned that the notice provided by the utility company to its customers was not reasonably calculated to inform them of the procedure for protesting the possible termination of their utilities. Id. This Court further stated that the customers were deprived adequate notice to which they were entitled under the due process clause. Id.

DOUGLASS was not adequately apprised of the foreclosure procedure. FRONTIER's notice only apprised DOUGLASS that the nonjudicial sale would, "satisfy the obligation." However, the plain and simple language of the Notice of Trustee's Sale did not give DOUGLASS adequate notification of any claim of a deficiency action by FRONTIER. The Idaho State Supreme Court's holding penalized DOUGLASS for relying on the language of the Notice of Trustee's Sale. The Idaho Supreme Court's decision directly conflicts with the guarantee of due process as explained by this Court.

FRONTIER's notice that the nonjudicial sale would "satisfy" DOUGLASS' obligation implicitly represented to DOUGLASS that the debt would thereby be discharged. FRONTIER could have inserted statutory language notify-

ing DOUGLASS of a deficiency judgment but failed to do so. DOUGLASS had a right to rely on the notice because it superseded the Idaho statutes.

It has been recognized that "parties whose rights are to be effected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). It has also been held that fundamental requisites of due process are "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914).

Therefore, at a minimum, the United States Constitution requires that deprivation of property must be proceeded by "notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank And Trust Co., 339 U.S. 306, 313 (1950). In addition, such notice "must be granted

at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Explaining the fundamental requirements of procedural due process, the United States Supreme Court set forth the following standard:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

The Idaho Supreme Court is not immune from the operation of the 14th Amendment of the United States Constitution simply because it has followed state statutory law. The Idaho State Supreme Court's decision violates DOUGLASS' due process right to receive adequate notice guaranteed by the United

States Constitution and the Idaho State Constitution.

The action of state courts in depriving parties of substantive rights without providing adequate and informed notice to defend is a denial of due process of law guaranteed by the 14th Amendment of the United States Constitution. Shelly v. Kraemer, 334 U.S. 1 (1948). The power of the state to enforce property interests must be exercised within the boundaries defined by the 14th Amendment. Marsh v. Alabama, 326 U.S. 501 (1946). Where it is clear that action of the state violates the terms of the United States Constitution, it is the obligation of the United States Supreme Court to so declare. Shelly v. Kraemer, supra.

This Court should conclude that the trust property was sold to satisfy the obligation under the Notice of Trustee's

sale and that FRONTIER has no claim for a deficiency judgment.

B. Clear, Unambiguous Language of the Notice

The legal effect of an unambiguous written document is a matter of law for this court as well as for the trial court. Latham v. Garner, 673 P.2d 1048 (Idaho 1983). The initial inquiry for determining whether a document is ambiguous is also a matter of law. Prouse v. Ransom, 791 P.2d 1313 (Idaho Ct. App. 1989).

This court should conclude the language in FRONTIER's notices, "to be sold to satisfy" the obligation is reasonably susceptible to only one meaning. "To satisfy" is not vague, unknown phraseology but has a well-settled definition known to the general populace. "Satisfy" is also an established term of art in the business

world and in the judiciary. Black's defines "satisfy" as "to answer or discharge, as a claim, debt, legal demand or like . . . To comply actually and fully with a demand; to extinguish, by payment or performance." Black's Law Dictionary 1342 (6th ed. 1990).

Additionally, several courts have construed the term. See, e.g., Boca Ratone Co. v. Commissioner, 86 F.2d 9 (3d Cir. 1936); Swaner v. Union Mortgage Co., 105 P.2d 342 (Utah 1940) ("satisfy" means to answer or discharge, as a claim, debt, legal demand or the like); Waters v. Lanier, 157 S.E.2d 796 (Ga. Ct. App. 1967) ("satisfaction" is the discharge of an obligation by paying a party what is due him or her, as on a mortgage, lien or contract); Pennsylvania Threshermen & Farmers Mut. Casualty Ins. Co. v. Hill, 148 S.E.2d 83 (Ga. Ct. App. 1966) ("satisfaction" is an accep-

tance of full compensation for an injury); Jersey Island Dredging Co. v. Whitney, 86 P. 509 (Cal. 1906) ("satisfaction" imports a release and discharge of the obligation in reference to which it is given); Kronebusch v. Raumin, 42 N.W. 656 (Dakota 1889) ("satisfaction" means to comply with the rightful demands of; to give what is due to; to pay off; to requite).

DOUGLASS relied upon the Notice of Trustee's Sale principally and secondarily on the Notice of Default. Both notices provided that the trust property would be sold to "satisfy" the obligation. DOUGLASS stated in his uncontroverted affidavit that he relied upon the unequivocal language in the Notice of Trustee's Sale to his detriment (H. Douglass Aff., Appendix E).

The Idaho Supreme Court's requirement that DOUGLASS read Idaho Code

§ 45-1512 and Idaho Code § 45-1505(3) together to be adequately notified of a deficiency judgment is not proper notice as required by due process. The Fourteenth Amendment to the United States Constitution and Article 1 Section 13 of the Idaho State Constitution both provide that no person shall be deprived of property without due process of law.

By DOUGLASS' uncontroverted affidavit, DOUGLASS alleges that he relied upon the clear wording of the Notice of Trustee's Sale to his detriment. DOUGLASS explained that he would have attended the foreclosure sale and bid on the property to protect his interests had he known that a deficiency judgment was possible. DOUGLASS has been deprived of his property without proper due process of law. This Court should conclude that DOUGLASS was denied due process by FRONTIER's inadequate notice.

CONCLUSION

The decision of the Idaho State Supreme Court violates the Due Process Clause of the United States Constitution as interpreted by this Court.

DOUGLASS urges this Court to accept DOUGLASS' Petition for Writ of Certiorari and adopt the minority opinion of Judge Bisline's dissent and reverse the decision of the Idaho Supreme Court.

Respectfully submitted,

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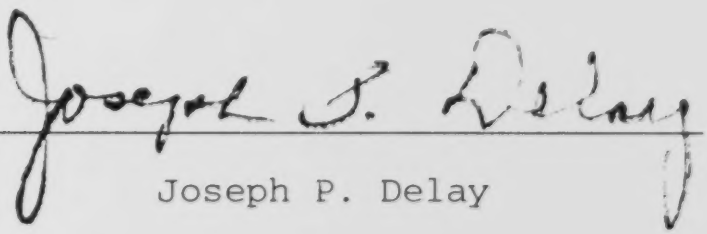
By 
Joseph P. Delay

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1993 OPINION NO. 41

IN THE SUPREME COURT OF
THE STATE OF IDAHO
S. CT. NO. 18748

FRONTIER FEDERAL SAVINGS and LOAN ASSOCIATION,	)	BOISE OCTOBER 1992 TERM
Plaintiff-Respondent,	)	FILED: April 23, 1993
v.	)	FREDERICK C. LYON, CLERK
HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,	)	
Defendants-Appellants	)	

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai. Honorable Richard G. Magnuson, District Judge.

Affirmed.

Cooke, LaManna, Smith and Cogswell, Sandpoint, Idaho, Delay, Curran, Thompson & Pontarolo, P.S., of Spokane, Washington, and Elam, Burke & Boyd, Boise, Idaho, attorneys for appellants. Joseph P. Delay argued.

Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., Boise, Idaho, and Stoel, Rives, Boley, Jones & Grey, Boise, Idaho, attorneys for respondent. Dale G. Higer argued.

McDEVITT, C.J.

BACKGROUND AND PRIOR PROCEEDINGS

On February 3, 1989, respondent, Frontier Federal Savings and Loan Association ("Frontier"), filed a complaint against appellants, Harlan D. Douglass, Maxine H. Douglass, and Steven J. Hassing ("Douglass and Hassing"). Frontier alleged that Douglass and Hassing executed a note and deed of

trust upon certain real property in Kootenai County, Idaho, dated October 3, 1985, to secure indebtedness to Frontier in the amount of $1,300,000.00. On July 1, 1988, Frontier alleged that Douglass and Hassing failed to pay the monthly installment due on the note. As a result, Frontier effected a nonjudicial foreclosure of the deed of trust, and held a trustee's sale on February 2, 1989. At the time of sale, Frontier alleged the allowing amounts due on the note: (1) principal in the amount of $1,293,608.21; (2) interest in the amount of $84,536.49; and (3) late charges in the amount of $3,211.88. In addition, Frontier alleged that it incurred the following expenses: (1) taxes and insurance on the real property in the amount of $4,235.37; (2) trustee fees and costs in the amount of $4,094.30; (3) appraisal fees in the

amount of $3,200.00; and (4) attorney fees in the amount of $600.00.

Frontier purchased the real property at the trustee's sale for $869,000.00. Applying this figure and the $20,606.01 in net rents received from the property to the above-listed amounts due and fees and costs incurred, Frontier alleged that Douglass and Hassing still owed $500,680.24 plus interest from February 2, 1989, to Frontier. Frontier also requested $25,000.00 in attorney fees pursuant to the term of the note.

After the complaint was filed, both parties moved for summary judgment. The district court granted Frontier's motion for summary judgment, and entered an order requiring Douglass and Hassing to pay Frontier $241,811.46, interest at $36.65 per day from May 1, 1990, until the date of the judgment, and attorney fees and costs.

ISSUES RAISED ON APPEAL

Douglass and Hassing raise a number of issues on appeal to this Court. First, they argue that Frontier (the beneficiary) was precluded from recovering a statutory deficiency judgment allowed by I.C. § 45-1512 by waiver or estoppel because the notice of trustee's sale stated that "[t]he beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation. . . ." (Emphasis appellant's.) Second, they argue that the sale was invalid, precluding a deficiency judgment, due to multiple violations of the nonjudicial deed of trust foreclosure statute. In this regard, Douglass and Hassing point to the following:

1. Frontier failed to nominate First American Title Insurance Company ("First American") as successor trustee

to Pioneer Title Company ("Pioneer") in writing pursuant to I.C. § 45-1504(2), after Pioneer's resignation as trustee on September 7, 1988;

2. Frontier filed to obtain Pioneer's resignation by failing to serve notice of intention to appoint a successor trustee upon Pioneer and Douglass and Hassing, pursuant to I.C. § 45-1504(2);

3. Frontier requested that notice of default be issued by First American when it was not the trustee, rather than by Pioneer;

4. The appointment of First American as trustee was made before the resignation of Pioneer as evidenced by the order in which they were recorded;

5. Frontier filed to deposit the deed of trust and note with the trustee as required under the terms of the deed of trust;

6. The trustee's deed provides that "the beneficiary made demand upon said Trustee to sell said property pursuant to the terms of said deed of trust." Frontier failed to make such demand upon Pioneer, and all such demand made on First American was not made on the then-existing trustee;
7. The trustee's deed certification of acknowledgment was defective because one signator did not sign in the presence of a notary;
8. The trustee's deed was void because it was not executed by the trustee because of improper resignation and appointment; and
9. The trustee breached its fiduciary relationship with Douglass and Hassing under the deed of trust by acting solely for and on behalf of Frontier.

Further, Douglass and Hassing argue that the district court erred in calculating damages, that this Court should reverse the district court based upon I.R.C.P. 54(d), 54(e), and I.C. §§ 12-120 or 12-121, and that if this Court reverses the district court, they are entitled to attorney fees and costs on appeal pursuant to I.A.R. 41. Finally, Frontier requests attorney fees on appeal.

ANALYSIS

A. Argument Regarding Waiver and Estoppel.

The thrust of Douglass and Hassing's argument goes to the language of the notice of trustee's sale and similar language in the notice of default: "[t]he beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation." Essentially,

Douglass and Hassing are saying that Frontier has waived or is estopped from asserting its right to a deficiency judgment, as set forth in I.C. § 45-1512, because the relevant language in the notice of trustee's sale and notice of default provides that the sale of the property will satisfy the obligation.

Idaho Code § 45-1505 (1957)[1] sets forth the conditions under which the trustee may foreclose a trust deed by advertisement and sale. It provides:

> **45-1505. Foreclosure of trust deed, when.** — The trustee may foreclose a trust deed by advertisement and sale under this act if:

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[1] Idaho Code § 45-1505 was amended, for the first time, in 1990, ch. 401, § 1, 1990 Idaho Session Laws 1122. Since the nonjudicial foreclosure in this case occurred prior to this amendment, we apply the 1957 version of I.C. § 45-1505.

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; and

(3) The trustee or beneficiary shall have filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and a copy of such notice by registered or certified mail to any person requesting such notice of record as hereinafter provided.

(4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof or if

such action or proceeding has been instituted, the action or proceeding has been dismissed.

(Emphasis added.)

Idaho Code § 45-1512 permits a beneficiary under a deed of trust to seek a deficiency judgment after a trustee's sale under a deed of trust. It provides:

> **45-1512. Money judgment — Action seeking balance due on obligation. —** At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security, and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, cost of sale and attorney[] fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale,

> but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust.

The above-quoted statutes, I.C. § 45-1505 (1957) and I.C. § 45-1512, were both enacted in 1957 as part of an act relating to deeds of trust. An Act Relating To Deeds Of Trust, ch. 181, §§ 5, 12, 1957 Idaho Session Laws, 345, 347, 351-52. Thus, these statutes are in pari materia and must be construed together as parts of the act. Curtis v. Canyon Highway Dist. No. 4, ____ Idaho ____, ____, 831 P.2d 541, 550 (1992); Achenbach v. Kincaid, 25 Idaho 768, 775, 140 P. 529, 531 (1914).

Subdivision (3) of I.C. § 45-1505 requires that the trustee or beneficiary file a notice of default identifying the deed of trust and containing, among other things, a statement setting forth

his or her "election to sell or cause to be sold such property to satisfy such obligation." (Emphasis added.) Douglass and Hassing argue that the relevant language of the notice of trustee's sale and notice of default, regarding Frontier's election to sell the property to satisfy the obligation, is inconsistent with I.C. § 45-1512, resulting in Frontier waiving or being quasi-estopped from asserting its right to seek a deficiency judgment. However, it is clear that the relevant language in the notice of trustee's sale and notice of default is required by I.C. § 45-1505(3). It is well settled that "[w]aiver is a voluntary, intentional relinquishment of a known right or advantage." Tiffany v. City of Payette, 121 Idaho 396, 403, 825 P.2d 493, 500 (1992), quoting Brand S Corp. v. King, 102 Idaho 731, 734, 639 P.2d 429, 432

(1981). Nothing in the record before this Court establishes that Frontier voluntarily and intentionally relinquished its right to seek deficiency judgment.

We must construe I.C. §§ 45-1505 and 45-1512 together, since they are both parts of the same act, directly relating to the same subject matter. If Douglass' and Hassing's argument were correct, I.C. § 45-1505(3) would render I.C. § 45-1512 meaningless. Every time a beneficiary or trustee complied with the requirements of I.C. § 45-1505(3), they would not be permitted to seek deficiency judgment after the sale because, as appellant argues, they would have agreed to accept the amount received at the sale in full satisfaction of the obligation. In order for quasi-estoppel to apply, Frontier would have had to have taken an

earlier position, with knowledge of the facts and its rights, inconsistent with its later position that it was entitled to seek deficiency judgment, to the detriment of Douglass and Hassing. KTVB, Inc. v. Boise City, 94 Idaho 279, 282, 486 P.2d 992, 994 (1971). The record clearly shows that Frontier complied with the relevant statutes. In other words, Frontier's actions evidence its intent to allow the statutory scheme so that it could seek a deficiency judgment on Douglass' and Hassing's note obligation.

B. Argument Regarding Multiple Violations of the Nonjudicial Deed of Trust Foreclosure Statute, I.C. § 45-1504.

Douglass and Hassing essentially argue that there were cumulative errors made by Frontier and, these errors, taken in toto, require this Court to reverse the district court. Our review of the

record, however, establishes that none of the alleged errors are violations of the statute.

Subdivision (2) of I.C. § 45-1504 provides:

> (2) In the event of death, dissolution, incapacity, disability or resignation of the trustee, the beneficiary may nominate in writing another qualified trustee. Provided, however, that the beneficiary may, for any reason obtain the resignation of the trustee by serving upon the trustee and the grantor in the deed of trust, at their last known address, a notice of intention to appoint a successor trustee. Said notice shall be given by registered or certified mail, and twenty (20) days after the date of mailing the notice of intention to appoint a successor trustee the beneficiary may nominate a successor trustee. Upon recording in the mortgage records of the county or counties in which the trust deed is recorded of the appointment of a successor trustee, the successor trustee shall be vested with all of the powers of the original trustee. Provided that a trustee may not be changed at the beneficiary's nomination after foreclosure has commenced by the filing of the notice of default and is proceeding timely.

As to Douglass' and Hassing's first assignment of error, regarding the nomination of First American as successor trustee to Pioneer, we find no error. The record clearly shows that Pioneer voluntarily resigned as trustee on September 7, 1988, and First American was appointed successor trustee on the same day. Frontier's actions in this regard comply with the language of the statute.

Douglass' and Hassing's second assignment of error, regarding Frontier's failure to serve notice of its intention to appoint First American as successor trustee, also fails. The second and third sentences of I.C. § 45-1504(2), which provide for notice, are clearly intended to apply to those situations where the trustee refuses to resign. Here, Pioneer voluntarily resigned.

The third assignment of error, regarding Frontier's request for issuance of the notice of default by First American, is also not error. There is no requirement that a resignation of trustee be recorded. The fact is that First American was appointed successor trustee and that appointment was recorded, thus giving First American all powers of the original trustee, I.C. § 45-1504(2), and complying with the first of three requirements before foreclosure could proceed, I.C. § 45-1505(1). Furthermore, the record shows that the notice of default was executed after Frontier had appointed First American as successor trustee.

The fourth assignment of error, regarding the appointment of First American before the recordation of Pioneer's resignation, also must fail. There is no requirement that the

resignation of a trustee be recorded.

The fifth assignment of error, regarding deposit of the deed of trust and note with the trustee as required by the deed of trust, also fails. The record shows that First American received the notice of default, which provided that "a breach of the obligation for which such transfer has occurred... and that the beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation." Furthermore, the deed of trust does not state when the deed of trust and note must be deposited with the trustee. Based on these facts, we conclude that the district court correctly ruled that Douglass and Hassing were not prejudiced by any delay in providing the instruments to First American.

The Sixth assignment of error, regarding demand to sell upon the trustee, is also not error. Once again, Douglass and Hassing are arguing that First American was not the trustee at the time Frontier made demand upon it. As we have already held, the record clearly shows that Pioneer had resigned as trustee and that First American was properly appointed as trustee.

The seventh assignment of error, regarding a signator of the trustee's deed not signing in the presence of a notary, also fails. This argument relates only to whether the deed could be recorded and not to the validity of the deed or sale.

The eighth assignment of error, relating to execution of the trustee's deed, is simply another attack on whether First American was properly appointed as successor trustee, and, for

the reasons stated above, fails.

The ninth assignment of error, regarding the trustee fiduciary relationship with the grantors, also fails. The record shows that First American accepted Frontier's bid of $869,000.00. Frontier, acting through First American, was the only bidder at the sale, and the trustee under the terms of the notice of sale was obligated to accept Frontier's bid. Idaho Code § 45-1506(8) dictates, inter alia, that: "[t]he trustee shall sell the property in one parcel or in separate parcels at auction to the highest bidder. Any person, including the beneficiary under the trust deed, may bid at the trustee's sale... ." (Emphasis added.) In addition, I.C. § 45-1506(9) provides that "[t]he purchaser at the sale shall forthwith pay the price bid and upon receipt of

payment the trustee shall execute and deliver the trustee's deed to such purchaser... ." (Emphasis added.) Frontier was the only bidder at the sale. Thus, First American was obligated to accept Frontier's bid and deliver the trustee's deed to Frontier upon receipt of payment.

C. Argument Regarding the District Court's Calculation of Damages.

Idaho Code § 45-1512 (which is quoted above) establishes the beneficiary's right to seek a deficiency judgment, as well as the formula for calculating that judgment. The statute states that "the plaintiff shall set forth in his [or her] complaint the entire amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney fees." I.C. § 45-1512. This amount may include

such items as "taxes, assessments, premiums for insurance or advances made by a beneficiary in accordance with the terms of the deed of trust. .. ." I.C. § 45-1506(12). The district court's award complied with these limitations.

The deed of trust provides that in the event of default, the holder of the note can declare the whole amount due and payable "and the same shall thereafter bear interest at the rate of sixteen percent (16%)." The note provides for the payment of interest until the entire indebtedness is fully paid. This language clearly gives Frontier a right to receive the 16% interest it alleged in the amounts owing. We hold that Frontier is entitled to this rate of interest until the date of judgment.

D. Frontier's Request for Attorney Fees on Appeal.

Frontier requests attorney fees on appeal pursuant to provisions in the note, deed of trust, and I.C. §§ 12-120(3) and 121. The first provision of the note, appearing in the second paragraph on page 3, states:

> Should any action be brought for the collection of any principal or interest of this Note, the undersigned promises to pay all costs thereof including such additional sum as attorney fees as the court may adjudge reasonable.

Douglass and Hassing were the "undersigned" who promised to pay reasonable attorney fees in the event that an action was brought to collect any principal or interest. Pursuant to this provision, and because Frontier is the prevailing party on appeal, we award reasonable attorney fees on appeal to Frontier. See Hellar v. Cenarrusa, 106 Idaho 571, 578, 682 P.2d 524, 531 (1981) ("attorney fees are to be awarded only

where they are authorized by statute or contract").

For the foregoing reasons, we affirm the decision of the district court.

Costs and attorney fees on appeal to Frontier.

JOHNSON and TROUT, JJ., concur.

BAKES, J., Pro Tem (allowing retirement on February 1, 1993), concurs.

BISTLINE, J. dissenting.

This office originally circulated to the Court membership a final draft of a proposed majority opinion, much of which now comprises this dissenting opinion. That opinion failed to obtain a majority, and now is meaningless ancient history, other than serving to demonstrate the collegiality of the Court as presently constituted. Justice McDevitt, in authoring his opinion which

has gained a majority, embodies much of what this office wrote earlier.

Putting that observation aside, I add that Justice McDevitt's majority opinion is well written; it represents one view. I write to set forth my initial views which, in comparison to the opinion drafted by Justice McDevitt, primarily relate to the main issue, i.e., what message did Frontier send to Douglass and Hassing in advising them that Frontier was going to sell the Douglass trust property for the purpose which Frontier stated, that is, to satisfy such obligation.

Justice McDevitt has written similarly:

> Subdivision (3) of I.C. § 45-1505 requires that the trustee or beneficiary file a notice of default identifying the deed of trust and containing, among other things, a statement setting forth his or her election to sell or cause to be sold such property to satisfy such obligation.

There is no ambiguity whatever in the immediately foregoing statement, and it is a true and accurate statement. It was incumbent upon Frontier to select the language it would use, and it did so. Frontier in retrospect likely would prefer that the language of I.C. § 45-1505(3) stated that the property would be sold "toward satisfaction" of the unpaid debt. But that language was not used, and things are as Justice McDevitt states, i.e, the Douglass property will be sold to satisfy the debt obligation of Douglass (including his co-defendants). Language clearly written, as is the above quoted sentence, leaves no room for tortuous misconstruction.

Frontier complains of the statutory language because of the havoc which that language may wreak on its plan to reap yet a second harvest chum whatever holdings Douglass and Hassing may have

left. That lament would be better made to the legislature, which was the authoring body of I.C. § 45-1505(3). Equally clear, Frontier has taken no remedial action seeking the legislature's revision of I.C. § 45-1505(3), thus evidencing the wise decision to let a sleeping dog lie.

Justice McDevitt next states:

> Douglass and Hassing argue that the relevant language of the notice of trustee's sale and notice of default, regarding Frontier's election to sell the property to satisfy the obligation, is inconsistent with I.C. § 45-1512, resulting in Frontier waiving or being quasi-estopped from asserting its right to seek a deficiency judgment. However, it is clear that the relevant language in the notice of trustee's sale and notice of default is required by I.C. § 45-1505(3). It is well settled that [w]aiver is a voluntary, intentional relinquishment of a known right or advantage.' Tiffany v. City of Payette, 121 Idaho 396, 403, 825 P.2d 493, 500 (1992), quoting Brand S. Corp. v. King, 102 Idaho 73 1, 734, 639 p.2d 429, 432 (1981). Nothing in the record before this court establishes that Frontier voluntarily and intentionally relinquished its right to seek deficiency judgment.

Little needs to be said relative to the above statement that "it is clear that the relevant language in the notice of trustee's sale and notice of default is required by I.C. § 45-1505(3)." True enough, the language so reads. It would amount to fundamental error or lack of procedural due process if a party were not given notice of a proceeding wherein he or she is involved. But the fact still remains that the statute does not speak in terms of selling such trust property and applying the proceeds toward satisfaction of the debtor's obligation. The statute speaks in terms of "selling such property to satisfy such obligation," a difference with a distinction, a distinction which Frontier is not at liberty to disregard-not if this Court is to retain its integrity.

In the paragraph above quoted, Justice McDevitt correctly illustrates the con tentions of Douglass and Hassing relevant to the particular statutory language which they assert is required by I.C. § 45-1505(3). That provision requires a notice of default identifying the deed of trust, a borrower's breach, and a trustee's "election to sell or cause to be sold such property to satisfy such obligation." The "to satisfy" language is entirely without ambiguity; "toward satisfaction" would be equally so. Everyone knows when paying on an account, he or she does not pay off the account. It might be perchance that the proceeds from a mortgage foreclosure sale would satisfy the debt, but equally likely, the proceeds realized on selling out an impoverished farmer might not satisfy his or her indebtedness, in which event

the forecloser may, or may not, discover other assets.

Judge Magnuson attempted to shed light on these circumstances wherein neither of the parties involved bears any responsibility for the questionably worded statute:

> [T]he defendants point to the phrase:
>
> 'And that [sic, the] beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation,'
>
> which was set forth in the closing sentence of the Notice of Default, issued by Frontier on September 7, 1988. Defendants claim the plaintiff thereby waived any claim to a deficiency judgment.
>
> The defendants also point to the following sentence used in the Notice of Trustee's Sale:
>
> 'Said sale will be made... to satisfy the obligation secured by and pursuant to the power of sale conferred in the deed of trust executed by (defendants) to (First American, as successor) for the benefit and security of (Frontier)...'

This subject was also mentioned a second time in the Notice of Trustee's Sale, wherein it was stated:

> 'The beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation.'

An examination of the Notice of Default shows the first quotation was a part of the printed form used by Frontier. Such examination of the Notice of Trustee's Sale indicates the first subject quotation therein was a part of the printed form, while the second quotation therein was set out in typewritten form.

The last three quotations above form the basis for defendants' contention that Frontier somehow waived its right to later claim a deficiency, or forfeited such right, inasmuch as these instruments did not mention or warn the defendants that a claim for deficiency may be later made against them.[2]

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[2] A foreclosing mortgagee has no obligation to give warning of an anticipated foreclosure action. It is not seen wherein Douglass raised any contention of being entitled to a warning of any kind whatever. The district court here went astray, albeit only slightly.

> This Court understands these quotations regarding the 'satisfaction of obligation,' to have been used to describe the purpose of the sale, rather than to indicate, in anyway [sic], a waiver by the beneficiary of any claim to a deficiency.[3]
>
> 'Waiver' is defined by Black's Law Dictionary, Third Edition as:
>
> > 'The intentional or voluntary relinquishment of a known right.'
>
> It is distinguished from 'estoppel,' which is based on some misleading conduct or language of one person, which, being relied on, operates to the prejudice of another.

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[3] There is not in this paragraph a tendered explanation as to how the district judge was brought to that understanding. Nor are we able to theorize a rationale which would be apropos the particular scenario here presented. Although the trial court clearly recognized the critical importance of "to satisfy the obligation" and reviewed prior pertinent authority, not justified is the ipse dixit conclusion that the language of the statute was pointed at the "purpose of the sale," which purpcse was clearly "to satisfy said obligation." Simply stated, the court presented no ratio decidendi for his "understanding." Moreover, the Douglass claim is not as to the Frontier "intent" to waive, but was to the fact that it did waive, although such was attributable to the misguidance of the statutory language.

In the Idaho case of Brand S v. King, 103 Ida. 731 [sic 102 Idaho 731], at 734, it was stated that waiver is a voluntary, intentional relinquishment of a known right or advantage."[4]

In the case of Riverside Development v. Ritchie, 103 Ida. 515, the court said the existence of a waiver is ordinarily a question of fact[5] and if there is substantial evidence in the record to support such waiver it is for the trier of fact to determine whether the evidence establishes such waiver. In that case, both sides moved for a summary judgment on the same evidentiary facts and effectively stipulated there was no genuine issue of material fact.

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[4] This Court in its unanimous opinion in Brand S v. King did say, as the trial court here stated, "Waiver is a voluntary, intentional relinquishment of a known right or advantage." 102 Idaho at 734, 639 P.2d at 432. In the same paragraph in which is found the quotation supplied by Judge Magnuson, this Court's Brand S opinion went on to cite four cases from this Court, the most recent of which was Idaho Bank of Commerce v. Chastain, 86 Idaho 146, 383 P.2d 849 (1963), which had the same holding as Riverside v. Ritchie, 103 Idaho at 521, 550 P.2d at 663, note 4, infra, i.e., "Waiver arising out of conduct is in the nature of estoppel."

[5] The language used in this Court's Riverside opinion is:

> [W]aiver is primarily a question of intent, and we believe the better policy is to judge each situation on a case by

> case basis. In regard to similar questions involving the theory of equitable estoppel,[5] this Court has rejected the adoption of rigid standards, relying rather on a case by case analysis, City of Nampa v. Swayne, 97 Idaho 530, 534, 547 P.2d 1135, 1139 (1976); Dalton Highway Dist. of Kootenai County v. Sowder, 88 Idaho 556, 562, 401 P.2d 813 (1965), and we think that policy is prudent here.
>
> [5] Waiver arising out of conduct is in the nature of estoppel. Idaho Bank of Commerce v. Chastain, 86 Idaho 146, 154, 383 P.2d 849, 853-84 (1963).

It is to be kept in mind that the district court, although it discussed the Riverside opinion, omitted any mention of footnote 5 therein and its content. Nevertheless, the district court on its reading of Jones v. Maestas, 108 Idaho 69, did observe that waiver could be found in evidence of conduct giving rise to an estoppel as a matter of law. Having advanced that thought, however, the court turned to the principle of waiver as discussed in Seaport Citizens Bank v. Dippel, 112 Idaho 736, 735 P.2d 1047 (1987), which is notable for bringing to the surface Independent Gas & Oil Co. v. T.B. Smith Co., 51 Idaho 710, 10 P.2d 317 (1932). In Independent Gas this Court's opinion dealt with distinctions between the principles of waiver and estoppel by approving and adopting Judge Robert M. Terrell's memorandum opinion denying a motion for a new trial. Id. at 719-24, 10 P.2d at 320-23.

The Court of Appeal's Seaport v. Dippel opinion was the most recent case to utilize Independent Gas. It also quoted a passage which it saw as applicable in the case before it for decision, and which we likewise see applicable in the instant case:

> This case presents elements of both waiver and estoppel. As noted by our Supreme Court, approving and adopting the analysis of a district judge:

> The only distinction that I can observe between an implied waiver such as pleaded here and estoppel would seem to be that in the case of an implied waiver there must be some conduct on the part of the person waiving from which it may be inferred that the person waiving intended to waive; in other words, affirmative action on the part of the person waiving indicating an intention to waive some benefit or advantage; whereas, in estoppel a barrier is simply set up regardless of the parties' intentions which precludes one from asserting a right which he would otherwise have but for the matters and things pleaded by the way of estoppel, if such matters and things are properly pleaded and proven. In other words, it is conceivable that an estoppel might sometimes apply in a case where at the same time the evidence would not support the conclusion that some right had been impliedly intentionally waived.
> Seaport v. Dippel, 112 Idaho at 739, 735 P.2d at 1050 (emphasis added) (quoting Independent Gas, 51 Idaho at 720, 10 P.2d at 321).

The Supreme Court stated in the Riverside case that, where the matter is to be tried by the court rather than a jury, summary judgment still may be appropriate despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between those inferences. Their review of the waiver issue extended only to determining if the record before them was sufficient to justify the district court's finding that Riverside did not waive its right to terminate the lease. ... On p. 520 of their decision, they stated that waiver is foremost a question of intent, and in order to establish waiver the intention to waive must clearly appear.... They upheld the trial court's entry of a partial summary judgment which included a finding that the lessor did not waive its right to terminate the subject lease.

The Idaho Court of Appeals addressed the subject of 'waiver' in the case of Jones v. Maestas, 108 Ida. 69, which held waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel.

In our instant case, this Court concludes there is not any clear evidence indicating waiver by Frontier or evidence of its conduct which would give rise to estoppel as a matter of law. To establish a waiver, the

intention to waive must clearly appear. Seaport v. Dippel, 112 Ida. 736 (App.).[6]

This Court concludes there was not any statutory or contractual requirement that any notice to the defendants specifically recite the beneficiary of a deed of trust intended to claim a deficiency. The Idaho legislature in enacting Section 45-1505(3) utilized the phrase 'to satisfy such obligation' to mean the proceeds of the sale would be applied to the obligation.'[7]

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[6] The district court is correct in relation to "waive." As to estoppel, however, it seems that the court, in concluding that evidence is missing as to a course of conduct giving rise to an estoppel, has failed to observe that the notice of default and the notice of trustee's sale, sent out by Frontier and its trustee, constitute evidence of conduct on the part of Frontier showing its intent to seek a deficiency judgment, notwithstanding the express representation in the notices that the purpose of the sale was stated as "to satisfy the obligation" of the Douglass note.

[7] There is a distinction with a difference in a phrase which states "to satisfy such obligation" as compared to a phrase which states "the proceeds obtained on the sale will be applied to the balance due on the note." Had Frontier's notices contained this latter statement or similar language, it is doubted that litigation would have become necessary.

Their enactment of this section of the Idaho Code was made at the same time as they enacted Section 45-1512 Idaho Code which provides the right of a beneficiary of a trust deed to seek a money judgment for the balance due (deficiency) upon the obligation for which such deed of trust was given as security. (See Chapter 181 of the 1957 Session Laws of the State of Idaho.) The right to seek and obtain a deficiency judgment is provided for by Idaho statute and need not be specifically claimed or reiterated in the notice of default or notice of trustee's sale.[8]

After this Court's review of the facts presented herein, it concludes the defendants, including Harlan Douglass, were not justified in relying upon the aforesaid quotations as a waiver by Frontier of any rights it had to later seek a deficiency judgment.

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[8] The final sentence of this paragraph is overly broad in that the "right to seek a deficiency judgment" is all that the statute provides. If timely brought, "a money judgment may be sought for the balance due upon the obligation which such deed of trust was given as security. . . ." There may be other obstacles which surface whenever a grantor/ trustor seeks to exact a deficiency judgment.

> This Court concludes the documents related to Pioneer's resignation as trustee, Frontier's appointment of First American as trustee, Frontier's Notice of Default and the First American's Notice of Trustee's Sale all fulfilled the requirements of the pertinent statutes or the deed of trust, and they were properly executed and recorded. All parties entitled to receive notice of these proceedings did receive such notice. The trustee's sale was properly conducted.

Judge Magnuson's Memorandum Opinion, R. 164-68 (emphasis and footnotes added). The notice of default mentioned above in Judge Magnuson's written opinion bears the signatures of two Frontier vice presidents, duly acknowledged on the same date as the instrument was executed. The district court also discussed other contentions of both parties, none of which are germane because of the dispositive conclusion which cannot be ignored relative to the waiver and/or estoppel issue.

Both notices of sale and of default correctly describe the property which

Douglass deeded in trust as security for the benefit of Frontier, and its recordation. There is no issue in regard to the accuracy or validity of those notices. The total amount of the unpaid and past due obligation set forth on the notices was $1,293,608.21, plus accruing interest, all due as of September 28, 1988.

Turning to Douglass's first contention, both Frontier's notice of default and the trustee's notice of sale contained the following language, the application of which is disputed: "[t]he beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation," R. Vol. I, pp. 100-01 (emphasis added), which appeared once in the notice of default as part of the printed form, and twice in the notice of sale, as part of the printed form and as a typewritten addition. In essence,

Douglass contends that the language used in both of Frontier's notices inappropriately misled him into understanding that he was not going to be pursued for any resulting deficiency. Otherwise stated, his perception was that Frontier had made the determination to expose the property to public sale for whatever amount the property would fetch and forego any attempt to obtain a deficiency judgment which might very well be valueless. Accordingly, he has asserted that the above language resulted in estoppel and/or waiver by Frontier of its right under I.C. § 45-1512 to seek a deficiency judgment after the completion of the foreclosure sale.[9]

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[9] reserve the right to seek a deficiency judgment; it provides that "[a]t any time within 3 months after any sale under a deed of trust . . . a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security . . . ." I.C. § 45-1512.

Although this procedure is available under applicable Idaho statutes, it may be given up by a specific waiver, and also by conduct amounting to estoppel or waiver. The district court, as noted hereinabove, understood the contested language as serving no function other than describing the general purpose of the sale, i.e., which was that there was going to be an auction sale conducted by Frontier's appointed and instructed trustee. Accordingly, as noted above, the court summarily determined that Frontier had not, by waiver or by conduct giving rise to estoppel, precluded itself from pursuing Douglass for a deficiency judgment.

The legal effect of an unambiguous written document is a matter of law for this Court as well as for the trial court, over which we exercise free review. Latham v. Garner, 105 Idaho

854, 673 P.2d 1048 (1983). The initial inquiry for determining whether a document is ambiguous is also a matter of law. Prouse v. Ransom, 117 Idaho 734, 791 P.2d 1313 (Ct. App. 1989) (citing Clearwater Minerals Corp. v. Presnell, 111 Idaho 945, 729 P.2d 420 (Ct. App. 1986)).

In determining the effect of the notices of default and of sale received by Douglass, "to be sold to satisfy said obligation" is reasonably susceptible to only one meaning. "To satisfy" is not vague, unknown phraseology but has a well-settled definition known to the general populace. "Satisfy" is defined as "to carry out the terms of ... discharge ... to meet a financial obligation to (a creditor)." Webster's Third New International Dictionary (1967). Roget's Thesaurus defines "satisfy" as "[t]o supply fully or

completely," and lists as synonyms, "answer, fill, fulfill, meet." Roget's II, The New Thesaurus (1980). "Satisfy" is also an established term of art in the business world and in the judiciary. Black's defines "satisfy" as "[t]o answer or discharge, as a claim, debt, legal demand or the like. ... To comply actually and fully with a demand; to extinguish, by payment or performance." Black's Law Dictionary 1342 (6th ed. 1990).

Additionally, several courts have construed the term. See Boca Ratone Co. v. Commissioner, 86 F.2d 9 (3d Cir. 1936), and Swaner v. Union Mortgage Co., 99 Utah 298, 105 P.2d 342 (1940) ("satisfy" means to answer or discharge, as a claim, debt, legal demand or the like); Waters v. Lanier; 116 Ga. App. 471, 157 S.E.2d 796 (1967) ("satisfaction" is the discharge of an

obligation by paying a party what is due him or her, as on a mortgage, lien or contract); Pennsylvania Threshermen & Farmers Mut. Casualty Ins. Co. v. Hill, 113 Ga. App. 283, 148 S.E.2d 83 (1966) ("satisfaction" is an acceptance of all compensation for an injury); Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 P. 509 (1906) ("satisfaction" imports a release and discharge of the obligation in reference to which it is given); Kronebusch v. Raumin, 6 Dakota 243, 42 N.W. 656 (1889) ("satisfaction" means to comply with the rightful demands of; to give what is due to; to pay off; to requite).

In notifying Douglass that Frontier intended to sell the property to satisfy the obligation owed to Frontier, Frontier implicitly represented that the debt would be thereby discharged. Significantly, not only was that

language contained in the pre-printed forms, but it also had been manually typed in on the printed form used for giving notice of trustee's sale. Douglass, in his affidavit, avers that he relied upon this language to his detriment. No conceivable reason has been advanced to demonstrate that Douglass was not entitled to rely upon words of the English language which were entirely clear as to import and which were wholly unattributable to him. An stated in Douglass's affidavit of December 6, 1989, he would have attended the foreclosure sale and entered a bid but for his reliance on the notices, which led him to believe that no deficiency judgment would be sought. That was an election which he was as equally free to make as was Frontier's election to auction the property which Douglass had deeded in trust as security

protecting Frontier. Under such circumstances, he believed that he could let the property go for the amount which was against it. This Court should hold that his understanding of the notices received from Frontier and its appointed trustee was patently reasonable[10] and that Frontier is estopped from pursuing a deficiency judgment under both estoppel and the equitable doctrine of quasi estoppel.[11]

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[0] The judge's view, being that of an experienced jurist and counselor learned in the law, naturally differed from the Douglass view, which was that of one not so knowledgeable in the law.

[11] Keesee is practically on all fours with the underlying circumstances. In that controversy, as here, the transaction went awry when the buyer, Fetzek, who was purchasing on an installment contract, defaulted:

> But here reliance has been established. It is undisputed that the buyer, who had cured an earlier default in response to a notice referring to 'other' remedies, decided to forego curing the default in this instance because the sellers' notice told him that the consequence for not curing would be forfeiture--a consequence he was willing to accept. The buyer claims--and it is uncontroverted--

Unlike waiver, which requires a voluntary and intentional relinquishment of a known right or advantage, quasi estoppel is not dependent on intent. Keesee v. Fetzek, 111 Idaho 360, 723 P.2d 904 (Ct. App. 1986). Moreover, "concealment or misrepresentation of existing facts on the one side, or ignorance or reliance on the other is a necessary ingredient." Id. at 362, 723

> that if 'other' remedies had been mentioned, he would have cured the default and this lawsuit would have been avoided.
>
> Accordingly, we hold that quasi estoppel may be applied to this case. We further hold that the elements of quasi estoppel are satisfied here. The sellers have changed their position, subjecting the buyer to the expense of avoidable and unwanted litigation. Moreover, they now seek to collect the balance of the contract, whereas previously the buyer would have been required only to cure the then existing default. The buyer has been unfairly prejudiced, and stands to suffer an unconscionable detriment, as a result of the sellers' change in position. We conclude that quasi estoppel, accompanied in this case by reliance, justifies limiting the sellers to their original choice of forfeiture as a remedy.

Keesee, 111 Idaho at 362-63, 723 P.2d at 906-97.

P.2d at 906 (citing Evans v. Idaho State Tax Commission, 97 Idaho 148, 540 P.2d 810 (1975)); see Theriault v. A.H. Robins Co., 108 Idaho 303, 698 P.2d 365 (1985). Quasi estoppel simply "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." Id. at 362, 723 P.2d at 906 (quoting KTVB, Inc. v. Boise City, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971)). The requirements for the application of quasi estoppel are that the party against whom it is asserted has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the party seeking application of the doctrine. KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971).

The Court should find that the elements of quasi estoppel have been

satisfied. With full awareness of its statutory right to seek a deficiency judgment, Frontier inserted language into its notices of default and sale, which language was inconsistent with later pursuing Douglass for a deficiency judgment. Actual reliance, although not necessary to quasi estoppel, see Keesee, has been established by Douglass's affidavit statement that the notices led him to forego appearing and bidding at the sale. By causing such a detriment to Douglass, Frontier has limited itself to foreclosure of the property. To hold otherwise would work an unconscionably harsh disadvantage upon Douglass.

The Court should conclude that Frontier is precluded from being awarded a deficiency judgment. The Court should further hold that the elements of both estoppel and quasi estoppel are satisfied. The judgment of the district

court should be reversed and the cause remanded with directions to enter judgment in favor of Douglass for costs and attorneys fees.

IN THE SUPREME COURT OF
THE STATE OF IDAHO

FRONTIER FEDERAL SAVINGS and LOAN ASSOCIATION,	)	
Plaintiff-Respondent,	)	ORDER DENYING PETITION FOR REHEARING
v.	)	
	)	NO. 18748
HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,	)	Ref. No. 93RH-21
Defendants-Appellants.	)	

The Appellants having filed a PETITION FOR REHEARING on May 14, 1993, and supporting BRIEF on May 21, 1993 of the Court's Opinion entered April 23, 1993; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellants' PETITION FOR REHEARING be, and hereby is, DENIED and the dissent on Denial of the Petition for Rehearing by Bistline, J., be, and hereby is, RELEASED.

DATED this 18th day of June, 1993.

By Order of the Supreme Court

/s/ Frederick C. Lyon

Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Craig C. Kosonen
Adm. Judge Gary M. Haman

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRONTIER FEDERAL SAVINGS and LOAN ASSOCIATION,	
Plaintiff-Respondent,	**Supreme Court No. 18748**
v.	**DISSENT ON DENIAL OF PETITION FOR REHEARING**
HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,	
Defendants-Appellants	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. The Honorable Richard G. Magnuson, District Judge.

BISTLINE, J., dissenting on denial of petition for rehearing.

PART I.

Deserving of a just resolution is the defendants/borrowers' contention that they were misled by the plaintiff/ lender, Frontier, into the understanding that Frontier would not pursue them for the entry of a deficiency judgment for the unpaid balance due Frontier Federal after it foreclosed on the encumbered property of the defendants. It is abundantly clear, and beyond cavil, that "the beneficiary" informed the Douglasses and Hassing that it had elected "to sell or cause the trust property to be sold to satisfy said obligation." Nothing could have been more certain than Frontier's statement of the election thus made. The Douglasses and Hassing were entitled to believe that the loss of their encumbered assets, i.e., the trust property, would be sold in satisfaction

of their obligation.

The majority, apparently believing itself obliged to come to the rescue of Frontier Federal Savings, predicates its contrary position on the slim hypothesis that: "Every time a beneficiary or trustee complied with the requirements of I.C. § 45-1505(3), they [beneficiary or trustee] would not be permitted to seek deficiency judgment after the sale because, as [defendants] argue, they would have agreed to accept the amount received at the sale in full satisfaction of the obligation." ____ Idaho at _____, _____ P.2d at _____. That statement is accepted as sound. It is the resultant reality encountered by Frontier Federal in blindly falling into the pitfall which resulted from the legislature's poor choice of language in drafting and enacting I.C. § 45-1505.

It is submitted that any attorney who is to some extent conversant with the English language, and possessed of reasonable schooling in the processes of the law, would readily see there is in fact and in truth only one correct reading of that passage. Nevertheless, the majority opinion encounters no problem in avoiding the irrefutable fact that neither plaintiff Frontier nor the Court majority are at liberty to ignore the language found in Frontier Federal's foreclosure notice: "Pursuant to I.C. § 45-1505, the trustee or beneficiary elect[s] to sell or cause to be sold such property to satisfy such obligation." The majority declines to come to grips with the realization that Frontier Federal, had it stated in its notices of default and sale that it elected to sell the trust property toward satisfaction of such obligation,

would not have found itself thereafter beset, besieged, and beleaguered. If, perchance, the sale netted enough cash return to pay the due amount of defendants' indebtedness, then in that event no further proceedings would be required.

In what is now ch. 15, TRUST DEEDS, particularly I.C. § 45-1505 (Vol. 8A), is found the identical language which first appeared in ch. 18, § 5(3) of the Idaho Code, approved upon enactment by declaration of an emergency, March 9, 1957:

> (3) The trustee or beneficiary shall have filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the

> obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property **to satisfy such obligation**; and a copy of such notice by registered or certified mail to any person requesting such notice of record as hereinafter provided.

Apparently it never occurred to the legislative personnel employed to draft the above that there could be foreclosure actions other than for total satisfaction of the borrower's indebtedness. Whoever sponsored the legislation obviously did not oversee the selection of language relative to foreclosing. Otherwise, put, it is not inconceivable, but indeed unlikely that there have been other foreclosures whereat the lender knew and realized that a fair way to treat an impecunious borrower would be to pursue what monies could be obtained, and in that way strive to obtain some remuneration for

application on the indebtedness due, i.e., toward satisfaction of the indebtedness rather than in full satisfaction.

In any event, it is abundantly clear that for a long period of time, extending to midsummer in this year 1993 from enactment of I.C. § 45-1505 in the spring of 1957, an elapse of over thirty-six years, I.C. § 45-1505 has remained intact as first written. Moreover, it is clear and unambiguous. For over the span of more than one-third of a century that statute has provided the right in the lender to foreclose a trust deed by advertisement and sale, provided that the lender (or his trustee or beneficiary), has complied with the requirements of I.C. § 45-1505, i.e., the proper filing of a notice of default which identifies the deed of trust by providing the name or names of the

trustor or trustors, and giving the book and page where the same is recorded, stating the nature of the breach and his election to sell or cause to be sold such property to satisfy such obligation.

Unfortunately, so it would see, Frontier Federal did not pause to consider available options, one of which was to not make an "election to sell or cause to be sold such [trust] property to satisfy such obligation." The obligation was simply that Hassing and the Douglasses were indebted to Frontier Federal, and not in any position to avoid the foreclosure being visited upon them, according to the provisions of I.C. § 45-1505.

For the reasons above and those stated in my dissenting opinion to this Court's 1993 Opinion No. 41, issued April 23, 1993, I would grant rehearing.

PART II.

Defendants-appellants' counsel on rehearing, Bobbi K. Dominick, a gifted writer, has researched the very narrow, single issue which is before us, and favors the Court with a well-written, fair, and dispassionate overview of the singularly not complex litigation, which is readily adopted and incorporated herein as Appendix A.

APPENDIX A.

A. STATEMENT OF THE ISSUES

Appellants, pursuant to Rule 42 of Idaho Appellate Rules, petitioned this court for rehearing on the following issues:

(1) Did Douglass (appellants') have a right to rely on the clear, unambiguous language of the Notice of Sale which stated the property would be sold to

"satisfy" the underlying obligation, thereby precluding Frontier Federal by waiver or quasi-estoppel, from asserting any right to a deficiency judgment?

(2) Under the circumstances of the case, with no evidence to rebut actual reliance, and evidence of inconsistent positions of Frontier Federal, is Frontier Federal estopped, by application of the doctrine of estoppel or quasi-estoppel, to deny Douglass' right to rely on the plain, unambiguous language of the Notice of Sale?

(3) Was Douglass denied his Constitutional right to due process?

B.ARGUMENT

The majority opinion justifies their decision by relying on provision (3) of I.C. § 45-1505. The court asserts that this statute authorizes the trustee or

beneficiary to file a Notice of Default identifying the deed of trust and containing, among other things, a statement setting forth his or her 'election to sell or cause to be sold such property to satisfy such obligation' (emphasis added). The court stated in its majority opinion:

> However, it is clear that the relevant language in the notice of trustee's sale and notice of default is required by I.C. § 45-1505(3).

The majority further states that if Douglass' argument was correct, I.C. § 45-1505 (3) would render I.C. § 45-1512 (the deficiency statute) meaningless.

At most, the statute applies only to a Notice of Default, however, the Court extended the statute to apply to the Notice of Trustee's Sale. There is no question that provision (3) of I.C. § 45-1505 is clear and applies only to a Notice of Default. However, the Court

in its majority opinion incorrectly extended the application of the statute to the Notice of Sale.

In these proceedings, Douglass relied upon the Notice of Sale principally and secondarily on the Notice of Default. Douglass stated in his affidavit that he relied upon the unequivocal language in the Notice of Sale, to his detriment. This statement is uncontroverted, undisputed and is an established fact.

Douglass asserts I.C. § 45-1505(3) is clear and that Douglass took the language in the Notice of Sale literally to mean that the property was sold to 'satisfy' the underlying obligation. This language did into authorize a deficiency action by Frontier. The language has no other interpretation. Justice Bistline in his dissent states:

> In determining the effect of the notices of default and of sale received by Douglass, "to be sold to satisfy said obligation" is reasonably

susceptible to only one meaning. "To satisfy" is not vague, unknown phraseology but has a well-settled definition known to the general populace. "Satisfy" is defined as "to carry out the terms of . . . discharge . . . to meet a financial obligation to (a creditor)." Webster's Third New International Dictionary (1967). Roget's Thesaurus defines "satisfy" as "[t]o supply fully or completely," and list as synonyms, "answer, fill, fulfill, meet." Roget's II, The New Thesaurus (1980). "Satisfy" is also an establish term of art in the business world and in the judiciary. Black's defines "satisfy" as "[t]o answer or discharge, as a claim, debt, legal demand or the like . . . To comply actually and fully with a demand; to extinguish, by payment or performance." Black's Law Dictionary 1342 (6th ed. 1990).

Additionally, several courts have construed the term. See Boca Ratone Co. v. Commissioner, 86 F.2d 9 (3d Cir. 1936), and Swaner v. Union Mortgage Co., 99 Utah 298, 105 P.2d 342 (1940) ("satisfy" means to answer or discharge, as a claim, debt, legal demand or the like); Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967) ("satisfaction" is the discharge of an obligation by paying a party what is due him or her, as on a mortgage, lien or contract); Pennsylvania Threshermen & Farmers Mut. Casualty Ins. Co. v. Hill, 113 Ga. App. 283, 148 S.E.2d 83 (1966) ("satisfaction" is an acceptance of

full compensation for an injury); Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 P.509 (1906) ("satisfaction" imports a release and discharge of the obligation in reference to which it is given); Kronebusch v. Raumin, 6 Dakota 342, 42 N.W. 656 (1889) ("satisfaction" means to comply with the rightful demands of; to give what is due to; to pay off; to requite).

In notifying Douglass that Frontier intended to sell the property to satisfy the obligation owed to Frontier, Frontier implicitly represented that the debt would be thereby discharged. Significantly, not only was that language contained in the preprinted forms, but it also had been manually typed in on the printed form used for giving notice of trustee's ale. Douglass, in his affidavit, avers that he relied upon this language to his detriment. No conceivable reason has been advanced to demonstrate that Douglass was not entitled to rely upon words of the English language which were entirely clear as to import and which were wholly unattributable to him. As stated in Douglass's affidavit of December 6, 1989, he would have attended the foreclosure sale and entered a bid but for his reliance on the notices, which led him to believe that no deficiency judgment would be sought.

It was clear to Douglass, who is entitled to due process, that the trust property was to be sold to satisfy the obligation to Frontier.

Justice Bistline also stated that by applying Idaho law to the facts in these proceedings, quasi-estoppel should apply against Frontier to preclude Frontier from any additional action for deficiency against Douglass. See KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971); Keesee v. Petzek, 111 Idaho 360, 723 P.2d 904 (Ct. App. 1986).

Douglass petitions this Court to follow the dissenting opinion by holding that Douglass relied to his detriment on Frontier's notices and that Frontier is limited to foreclosure of the property. It is not the duty of the Court to legislate; this power is left to the legislature. The function of the Court is to construe the Notice of Trustee's

Sale as given. Neither the Notice of Trustee's Sale nor the Notice of Default gave Douglass proper notice of a possible deficiency judgment, only that the sale was satisfying the obligation.

The Court's decision to read I.C. § 45-1512 and I.C. § 45-1505(3) together denies Douglass his right to due process. The Fourteenth Amendment to the United States Constitution provides in part that no 'state (shall) deprive a person of life, liberty, or property, without due process of law . . .' By uncontroverted affidavit, Douglass alleges that he relied upon the clear wording of the Notice of Trustee's Sale to his detriment. Douglass has been deprived of his property without proper due process of law.

It has been recognized that 'parties whose rights are to be affected are entitled to be heard; and in order that

they may enjoy that right they must first be notified.' Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). It has also been held that the fundamental requisites of due process are 'the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394 (1914). Therefor, 'at a minimum' the Fourteenth Amendment due process clause requires that a deprivation of life, liberty or property must be preceded by 'notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950). In addition, such notice 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Explaining the fundamental requirements of procedural due process, the United States Supreme Court set forth the following standard:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

Douglass was denied his constitutional right to proper notice. The Court should not place its stamp of approval on a faulty statute. By Douglass' uncontroverted affidavit, he explained that he would have attended the foreclosure sale and bid on the property had he known that a deficiency judgment was possible. Such lack of notice in the Notice of Trustee's Sale is blatant violation of Douglass' right to due process guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 13 of the Idaho State Constitution.

Under both the Idaho and United States Constitutions the right to procedural due process is guaranteed requiring that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. Rudd v. Rudd, 105 Idaho 112, 666 P.2d 639 (1983).

Idaho law states that the fact that the Idaho Constitution contains a due process clause with the same language found in the Fourteenth Amendment to the Constitution of the United States indicates that the drafters of the Idaho Constitution believed that the federal due process clause did not make it unnecessary for the Idaho Constitution to guarantee due process of law. Cootz v. State, 117 Idaho 38, 785 P.2d 163 (1989).

Also, according to Idaho law the right to use one's property in a lawful manner

is within the protection of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and this section providing that no person shall be deprived of life, liberty or property without due process of law. O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949). Additionally, the Idaho courts have explained that the fundamental requirement of due process is the opportunity to be heard in a meaningful manner. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

In the consolidated cases of Fuentes v. Shevin and Parham v. Cortese, 407 U.S. 67 (1972), the United States Supreme Court reviewed the constitutionality of state laws permitting the summary seizure of goods or chattels under a writ of replevin. In this case the Court stated:

> [T]he statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon the ex parte application of any other person who claims a right to them and posts a security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing.

Fuentes v. Shevin, supra at 69.

As in Fuentes, I.C. §45-1512 and I.C. § 45-1505, even when construed together allow the state to seize Douglass' possessions by Frontier's ex parte application. As in Fuentes, Douglass' due process is violated because these statutes do not give Douglass 'an opportunity to challenge the seizure at any kind of prior hearing.'

The United States Supreme Court has also explained that:

> [D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable

> validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . .

Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969). In effect, the Court's decision allowing a deficiency judgment against Douglass without proper notice equates to unconstitutional summary seizure of Douglass' property (the amount of the deficiency judgment). The statutory scheme of I.C. § 45-1512 and I.C. § 45-1505 is constitutionally defective by failing to provide proper notice as required by procedural due process.

The majority [of the] court, by construing the two statutes together, fails to rectify the inadequate notice and ensure that constitutionally required procedural safeguards are followed. The Court should properly conclude that the statutory language used in the Notice of Trustee's Sale

denies Douglass his right to due process by insufficient notice.

The Court should not disregard the U.S. Constitution and Douglass' Fourteenth Amendment Rights in interpreting I.C. § 45-1505(3). The language was plain and simple, and the Court can come to only one logical conclusion: the property was sold to satisfy the obligation.

An analogy can be drawn from the example of when a person is served with a summons and complaint. He has the right to rely solely on the clear meaning of its language or otherwise he is denied due process.

The Court's majority opinion states that in order to get the full meaning of the Notice of Trustee's Sale, I.C. § 45-1505 and I.C. §45-1512 'must be construed together.' In effect the Court is ruling that a person cannot

rely on the clear language of a Notice of Trustee's Sale. The Court's ruling requires that in order for a person to be properly notified of an impending foreclosure action against him he must additionally look at I.C. § 45-1505 and then construe it together with I.C. § 45-1512. Once he has construed the statutes, he must conclude that the language of the Trustee's Notice of Sale to satisfy the obligation does not really mean to 'satisfy' the obligation, but means that a deficiency judgment can also be brought against him. This is not proper notice.

The Court's decision defeats the purpose and intent of the Notice of Trustee's Sale. No statutes were served on Douglass. Douglass should not be penalized because he relied on the Notice of Trustee's Sale and did not seek out additional statutory law and

then 'construe' the statutes together for proper notice. Douglass acted properly by relying solely on the Notice of Trustee's Sale and should not be denied his Constitutional right to due process as a result.

C.CONCLUSION

Douglass justifiably relied upon the clear statutory language inserted into the Notice of Trustee's Sale and Notice of Default stating that the sale of the property was to 'satisfy' the obligation. The meaning of 'satisfy' is clear and unambiguous as explained by Justice Bistline's dissent.

I.C. § 45-1512 and I.C. § 45-1505 unconstitutionally deprive Douglass of his right to due process by not affording him proper notice of the deficiency judgment. The Court should adopt the minority opinion and find that

the Notice of Trustee's Sale in these proceedings precludes Frontier's recovery of a deficiency judgment. The petition for rehearing should be granted.

Respectfully submitted this 20th day of May, 1993.

ELAM, BURKE AND BOYD, Chartered

. . . .

By /s/ Bobbi K. Dominick

DELAY, CURRAN, THOMPSON & PONTAROLO, P.S.

. . . .

By /s/ Joseph P. Delay
Joseph P. Delay, WSBA No. 02044
Attorneys for Appellants
Douglass and Hassing

No. 1134611

NOTICE OF TRUSTEE'S SALE

On the 2nd day of February, 1989 at the hour of 2:00 o'clock P.M., of said day, in the lobby of the Office of First American Title Company, 1621 Third Street, Suite 100, Coeur d'Alene, County of Kootenai, State of Idaho, First American Title Company of Idaho, Inc., an Idaho Corporation, as successor trustee, will sell at public auction, to the highest bidder, for cash, in lawful money of the United States, all payable at the time of sale, the following described real property, situated in the County of Kootenai, State of Idaho, and described as follows, to-wit:

Tract 25, FRUITLAND ADDITION, Kootenai County, State of Idaho, and Tract 24, FRUITLAND ADDITION, except that portion of Tract 24 conveyed to the State of

Idaho by Warranty Deed recorded December 10, 1968 as Instrument No. 540494, records of Kootenai County, State of Idaho.

The Trustee has no knowledge of a more particular description of the above referenced real property, but for purposes of compliance with Section 60-113 Idaho Code, the Trustee has been informed that the address of West 408 Haycraft, Coeur d'Alene, Idaho is sometimes associated with said real property. For more information regarding the location of said real property contract First American Title Company at (208)667-0567.

Said sale will be made without covenant or warranty regarding title, possession or encumbrances to satisfy the obligation secured by and pursuant to the power of sale conferred in the deed of trust executed by HARLAND D. AND

MAXINE H. DOUGLAS, husband and wife and STEVEN J. HASSING, a single man, grantor, to FIRST AMERICAN TITLE COMPANY OF IDAHO, INC., an Idaho corporation, as successor trustee, for the benefit and security of Frontier Federal Savings and Loan Association, recorded October 7, 1985 as Instrument No. 1024361, Mortgage Records of Kootenai County, Idaho.
THE ABOVE GRANTORS ARE NAMED TO COMPLY WITH SECTION 45-1506(4)(a), IDAHO CODE. NO REPRESENTATION IS MADE THAT THEY ARE, OR ARE NOT, PRESENTLY RESPONSIBLE FOR THIS OBLIGATION. The default for which this sale is to be made is the failure to pay when due, under Deed of Trust Note dated October 3, 1985 the monthly payments for Principal, Interest and Impounds of $11,471.22 per month for the months of July through September, 1988 and all subsequent payments until the date of sale or reinstatement.

All delinquent payments are now due, together with unpaid and accruing taxes, assessments, trustee's fees, attorney's fees, costs and advances made to protect the security associated with this foreclosure,

and the balance owing as of this date on the obligation secured by said deed of trust is $1,293,608.21 plus accruing interest. The beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation.

DATED September 28, 1988

FIRST AMERICAN TITLE COMPANY
OF IDAHO, INC., TRUSTEE

. . . .

By /s/ Monine Cole
Monine Cole
Trust Officer
000084

No. 1129396

NOTICE OF DEFAULT

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION, as beneficiary under the Deed of or transfer in trust executed by HARLAN D AND MAXINE DOUGLASS, husband and wife and STEVEN J. HASSING, a single Man, as Grantor to FIRST AMERICAN TITLE COMPANY OF IDAHO, INC., an Idaho corporation, as Successor Trustee and Frontier Federal Savings and Loan Association as beneficiary, dated October 3, 1985 Recorded October 7, 1985 in Book page , as Instrument No. 1024361, Mortgage records of Kootenai County, Idaho, hereby give notice that a breach of the obligation for which such transfer is security has occurred, the nature of such breach being the failure

to (1) pay when due, under Deed of Trust Note dated October 3, 1985 the monthly payments for Principal, Interest and Impounds of $11,471.22 per month for the months of July through September, 1988 and all subsequent payments until the date of sale or reinstatement. All delinquent payments are now due, together with unpaid and accruing taxes, assessments, trustee's fees, attorney's fees, costs and advances made to protect the security associated with this foreclosure. and the balance owing as of this date on the obligation secured by said Deed of Trust is $1,293,608.21 plus accruing interest.

on the following described real property:

Tract 25, FRUITLAND ADDITION, Kootenai County, State of Idaho, and Tract 24, FRUITLAND ADDITION, except that portion of Tract 24 conveyed to the State of

Idaho by Warranty Deed recorded December 10, 1968 as Instrument No. 540494, records of Kootenai County, State of Idaho.

and that the beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation.

Dated: September 7, 1988

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION

/s/ Bruce L. Brewer, V.P.

/s/ Timothy W. Sullivan, V.P.

STATE OF WASHINGTON)
: ss.
County of Walla Walla)

On this 7th day of September, 1988, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Bruce L. Brewer and Timothy W. Sullivan to me known to be the Vice President and Vice President Secretary, respectively, of Frontier Federal Savings and Loan Association, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary

act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official hereto affixed the day and year first above written.

/s /
NOTARY PUBLIC in and for the State of Washington, residing at Walla Walla
My commission expires: 3/10/92

Dar Cogswell
COOKE, LAMANNA, SMITH & COGSWELL, CHARTERED
P.O. Box "C"
Sandpoint, Idaho 83864
Telephone: (208) 263-3115

Joseph P. Delay
DELAY, CURRAN, THOMPSON & PONTAROLO, P.S.
1212 Washington Mutual Building
West 601 Main Avenue
Spokane, Washington 99201
Telephone: (509) 455-9500

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, v. HARLAN D.DOUGLASS AND MAXINE H.DOUGLASS,husband and wife, and STEVEN J. HASSING, a single man, Defendants.	Case No. 76428 AFFIDAVIT OF HARLAN D. DOUGLASS

Harlan D. Douglass, being first duly sworn on oath deposes and says:

1. That Harlan D. Douglass has personal knowledge of the facts contained herein and is competent to testify concerning said facts and said facts would be admissible in evidence.

2. That Harlan D. Douglass is married to Maxine H. Douglass, both residents of Spokane County, Washington, and acquired the property which is the

subject matter of this dispute jointly with Steven J. Hassing, a single man. Steven J. Hassing was the contractor and manager of the entire project including the construction thereof. My participation was merely to jointly execute the financing documents. The total cost of the land and construction of the subject property totalled $1,433,735.00.

3. That your affiant and his wife executed the deed of trust attached to plaintiff's Complaint along with the promissory note. Frontier Federal Savings and Loan Association shall hereinafter be referred to as Frontier.

4. That in order to obtain the subject loan in 1985, your affiant and Steve Hassing had the property appraised at the request of Frontier by Morse & Company of Coeur d'Alene, Idaho. The property, assuming completion according

to the specifications, was appraised on August 16, 1985 for $1,508,000.00. That thereafter said building was generally constructed in accordance with the plans and specifications and was completed on or about the 1st day of September, 1986. Shortly after completion of the building, Steve Hassing commenced leasing the premises to various tenants.

5. On or about June 30, 1987; 17,194 square feet of the building had been leased at an average of $8.30 per square foot producing an annual income of approximately $142,715.00. At that date, 9,125 square feet was vacant (34.7%).

6. On September 25, 1987 Steve Hassing applied to Frontier to increase the loan amount from $1,205,000.00 to $1,325,000.00. On December 1, 1987 the loan amount was increased to $1,300,000.00 by Frontier.

7. Frontier approved a loan amount of $1,300,000.00 with amortization of 25 years beginning with January 1988 payment and debt service of $137,655.00. At that time, Larry Leech of Frontier appraised the subject property based on the amount of income produced for the sum of $1,645,000.00 on income approach (Leach Deposition, Exhibit 2C, P. 24.)

8. Steven J. Hassing hired and paid the subcontractor for the mechanical work on the subject construction. The subcontractor failed to pay its supplier, Blacks Industrial Inc. As a result of Blacks Industrial Inc. not being paid by the subcontractor it filed a lien. Thereafter foreclosed on the property. Blacks Industrial Inc. purchased the subject property at the foreclosure sale on July 12, 1988 and took possession. Thereafter was contacted by the law firm of Lukins &

Annis and asked if would quit claim the property agreed to quit claim my interest. Lukins & Annis agreed to draft the necessary documents to quit claim my interest. Thereafter heard nothing further from Lukins & Annis.

9. Shortly after September 7, 1988 received a Notice of Default from plaintiff indicating that the subject property was going to be sold to "satisfy said obligation". A copy the Notice is attached as Exhibit A.

10. Shortly after September 28, 1988 received a Notice of Trustee's Sale, the last sentence of that Notice provided in part:

> "The beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation". (Emphasis added.)

A copy of the Notice of Trustee's Sale is attached as Exhibit B.

11. I understood from both of these Notices that were sent to me (Notice of Default and Notice of Trustee's Sale) to mean that the sale of the trust real property would satisfy the obligation secured by the Note and Deed of Trust. I understood from reading that language in both notices that there would be no deficiency remaining after the sale. I relied on the aforesaid two notices that the property sale would satisfy said obligation to Frontier and therefore did not attempt to appear at the sale and bid in for the amount of the unpaid obligation. I was misled by the contents of said notices, because Frontier now seeks to recover for a deficiency and the sale by the Trustee did not satisfy said obligation.

12. During the summer of 1989 I checked with the realtors who presently managed the property and ascertained

that the property was for sale by Frontier Federal Savings and Loan Association though the property was not listed with the realtor. The property was valued by Beebe & McKernan and McCarty, real estate brokers in Coeur d'Alene, Idaho somewhere between $1,385,000.00 and $1,400,000.00.

13. I have reviewed the affidavit of Tim Sullivan of Frontier Federal Savings and Loan Association in support of its motion for summary judgment and disagree that the annual interest rate after July 1, 1988 should be at the rate of 16%, also disagree that the appraisal fee for the Trustee's Sale of $3,200.00 should be assessed against the subject property. The costs incurred after the Trustee's Sale of February 2, 1989 of $15,094.33, and the capital improvements in the amount of $10,479.15 are charges incurred after the sale and are not

proper charges. The deferred maintenance and capital improvements increase the fair market value of the subject property and the appraisals made by my appraisers Morse and Meenach deducted deferred maintenance and improvements from the appraisal price that was arrived at of $1,210,000.00. I also disagree with the charges listed for County Solid Waste Management Fee of $1,318.86 are improper charges as well as the 1988 and 1989 real estate taxes. Frontier did not allow any credit for rents collected through February 2nd inclusive.

/s/
HARLAN D. DOUGLASS

SUBSCRIBED AND SWORN to before me this 6th day of December, 1989.

/s/
NOTARY PUBLIC in and for the State of Ida, residing at Sandpoint
My commission expires: Aug. 19, 1993

Supreme Court, U.S.
FILED
SEP 17 1993
OFFICE OF THE CLERK

No. 93-286

In The

Supreme Court of the United States

October Term, 1993

HARLAN D. DOUGLASS AND MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,

Petitioners,

versus

FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

The real issue presented is whether the Idaho non-judicial foreclosure sale statutes as interpreted by the Idaho Supreme Court violate the due process clause of the Fourteenth Amendment of the United States Constitution.

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No. 93-286

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HARLAN D. DOUGLASS AND MAXINE H. DOUGLASS, husband and wife; and STEVEN J. HASSING, a single man,

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FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

Respondent, FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION, respectfully prays that the Petition for Writ of Certiorari filed by Petitioners to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

BASIS FOR JURISDICTION

Petitioners appear to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioners (hereinafter "Douglass") executed a note and deed of trust on certain Idaho real property to secure an indebtedness to Respondent (hereinafter "Frontier Federal") in the amount of $1,300,000.00. Douglass defaulted on the note and also allowed the property to be foreclosed upon by a mechanics' lienholder. Thereafter, Frontier Federal proceeded to effect a non-judicial foreclosure of the deed of trust pursuant to the pertinent Idaho statutes, specifically Idaho Code § 45-1505, which requires a notice of default stating that the beneficiary elects to sell the property "to satisfy such obligation." Frontier Federal purchased the property at the trustee's sale for $869,000.00. Frontier Federal then moved, pursuant to Idaho Code § 45-1512, to seek a deficiency judgment under the deed of trust. After Frontier Federal's action for a deficiency judgment was filed, Douglass answered claiming certain deficiencies in the conduct of the trustee's sale.

Both parties moved for summary judgment and, after the parties stipulated as to the fair market value of the property, the district court entered judgment in favor of Frontier Federal in the amount of $241,811.46 plus attorney's fees and interest. Nowhere in the trial court proceedings did Douglass claim that the Idaho statutes which allowed a deficiency judgment after the trustee's

sale and which required notice of default stating that the property was to be sold to "satisfy such obligation" were unconstitutional as a deprivation of due process.

Douglass appealed the trial court's ruling to the Idaho Supreme Court. On appeal, in addition to the arguments concerning improper conduct of the non-judicial sale, Douglass also claimed that Frontier Federal was precluded by waiver or estoppel from recovering the statutory deficiency judgment allowed by Idaho Code § 45-1512. Again, nowhere in the pleadings did Douglass claim a denial of due process rights. The Idaho Supreme Court affirmed the district court's summary judgment against Douglass.

Douglass filed a Petition for Rehearing to the Idaho Supreme Court. It was only at that late date that the Petitioners advanced an argument regarding denial of due process. The Idaho Supreme Court summarily denied Douglass' petition. Douglass then brought this Petition for Writ of Certiorari.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE DUE PROCESS ARGUMENT WAS NOT RAISED BEFORE OR PASSED UPON BY THE COURTS BELOW.

Pursuant to Rule 14.1(h) of the Rules of the United States Supreme Court, a petition for a writ of certiorari must specify the stage in the proceedings at which the federal questions sought to be reviewed were raised and

the way in which they were passed upon by the courts below. Douglass' petition does not contain such a required statement because the due process issue was not raised by Douglass until his petition for rehearing to the Supreme Court of the State of Idaho. Neither the trial court nor the Idaho Supreme Court considered or passed upon the constitutional issue since it was not timely raised by Douglass.

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review final judgments of the highest court of a state "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . ." The judgment of the Supreme Court of the State of Idaho does not uphold the validity of the Idaho non-judicial foreclosure statutes against constitutional challenge because no constitutional challenge was timely raised by Douglass.

The requirement that the Court will not address an issue which has not been presented to or decided by the state court below was analyzed by this Court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527, *reh'g denied*, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983). The Court held that whether the rule against deciding claims "not pressed nor passed upon" in the state court is based on jurisdictional considerations or prudential restrictions, it is inappropriate for the Court to decide questions not presented or decided in the courts below. 462 U.S. at 216-24. *See also Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). Those jurisdictional restrictions and/or prudential considerations apply in the present case, since the due process argument was not

timely raised by Douglass nor was it decided by the Idaho Supreme Court.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO GRANT THE PETITION.

Under Rule 10.1 of the Rules of the United States Supreme Court, a petition for writ of certiorari will be granted only "when there are special and important reasons therefor." It appears that Douglass is contending that the petition for writ of certiorari should be granted pursuant to Rule 10.1(c), which provides that one basis for the grant of a petition for writ of certiorari is when a state court has decided a federal question in a way that conflicts with applicable decisions of this Court. As discussed above, the Supreme Court of the State of Idaho was not presented with, and did not decide, any federal question. Its decision was based on an application of state law and an interpretation of state statutes.

Furthermore, the Idaho Supreme Court's decision interpreting Idaho statutes is consistent with this Court's interpretation of the due process clause of the United States Constitution.

The issue raised by Petitioner does not meet the criteria set forth in Rule 10 of this Court's Rules. Accordingly, Frontier Federal respectfully requests that the petition be denied. In the alternative, Frontier Federal requests the Court to issue a summary affirmance or a dismissal for want of a substantial federal question. Rule

16.1, Rules of the United States Supreme Court; *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

III

IDAHO CODE §§ 45-1505 AND 45-1512 ARE NOT UNCONSTITUTIONAL.

The Idaho non-judicial foreclosure statutes allow a lender to foreclose on a deed of trust and to pursue the borrower for a deficiency judgment if the sales price at the trustee's sale or the fair market value of the property as found by the district court is less than the amount owed. The Idaho statute requires that the trustee provide notice of default and notice of the pending sale to the borrower and that the notice provide that the lender elects to sell or cause to be sold "such property to satisfy such obligation." Idaho Code § 45-1505. Douglass contends that this language mandated by the Idaho statute serves to deny borrowers their constitutional right of due process because it does not give adequate notice to the borrower of the possibility of a deficiency judgment.

The Idaho statutory scheme provides for a two part non-judicial foreclosure on a deed of trust. If a borrower defaults on his obligations under the note and deed of trust, the trustee serves notice that the property will be sold at a trustee's sale. Idaho Code § 45-1505. There is no dispute that Douglass received notice of the pending trustee's sale.

Thereafter, Idaho Code § 45-1512 permits the lender to seek a deficiency judgment under the deed of trust if the trustee's sale does not bring in sufficient funds to cover the balance due under the promissory note. The

borrower is served with notice of this pending action and all hearings thereunder, and has the opportunity to be heard and present any defenses to the borrower's application for deficiency judgment. In addition, the borrower has the opportunity to present information to the court as to the fair market value of the property at the time of sale. After each party has the opportunity to be heard, the court may render a deficiency judgment, but may not render such judgment for more than the amount by which the indebtedness due at the time of sale exceeds the fair market value and the judgment may not exceed the difference between the amount for which the property was sold and the amount of the indebtedness. Thus, any deficiency judgment may be rendered only for the difference between the indebtedness and the greater of the fair market value or the sales price at the trustee's sale.

Due process requires that a person who is in jeopardy of loss of a property interest by state action be given notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Idaho Code § 45-1505 mandates that notice of the trustee's sale be provided to the defaulting debtors. Such notice was provided to Douglass in the instant case. A-82. That notice also contained, as required by Idaho Code § 45-1505, a statement of the balance owing for which the property was to be sold.

Idaho Code § 45-1512 explicitly provides that a creditor may seek a deficiency judgment after a trustee's sale. The statute in and of itself provides the notice required under the due process clause. But in addition, the statute requires that a court make the determination of the amount of the deficiency judgment after the debtor is

given notice and an opportunity to be heard regarding the validity of the debt, the fair market value of the property, and the proper amount of the deficiency.

Such statutory protections satisfy the requirements of due process as specified in this Court in *Fuentes v. Shevin*, 407 U.S. 67, 93 S.Ct. 177, 34 L.Ed.2d 165, *reh'g denied*, 409 U.S. 902, 93 S.Ct. 180, 34 L.Ed.2d 165 (1972), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The statutes provide for notice to the debtor and allow the debtor the opportunity to protect his property rights at the trustee's sale and to challenge the validity of the debt and the amount of the requested deficiency judgment at a hearing before a court.

The Idaho statutory scheme and the Idaho Supreme Court's interpretation of the statutes do not deprive Petitioner of due process under the Fourteenth Amendment to the Constitution.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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